IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 428, Misc.

In the Matter

of

BENJAMIN LEVITAS, an Attorney,

Petitioner,

and

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, which severely censured petitioner, is reported at 281 App. Div. 511 and 120 N. Y. S. (2d) 840.* A memorandum decision of the Appellate Division which denied a motion by petitioner herein for leave to appeal to the Court of Appeals of New York is reported at 281 App. Div. 1029 and 122 N. Y. S. (2d) 631. A memorandum decision by the Court of Appeals of New York dismissing an appeal taken by

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* For the convenience of the Court, we have included the opinion as an Appendix.

petitioner as of right, and also denying leave to appeal, is reported at 306 N. Y. 632 and 116 N. E. (2d) 242.

Jurisdiction

The judgment of the Appellate Division which severely censured petitioner was entered on April 21, 1953. The denial by that court of the motion for leave to appeal was on May 26, 1953. The order of the Court of Appeals dismissing the appeal as of right and denying leave to appeal was entered on November 20, 1953. The petition was filed February 18, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (3).

Question Presented

Although petitioner enumerates some nine questions, only the ninth suggests that it might be encompassed by the jurisdiction of this Court:

> "(9) Whether the petitioner was found guilty of professional misconduct without due process of law and in denial of his rights of free speech in Court and equal protection of the laws."

Statutory Provisions Involved

Section 90, subsections 2 and 8, of the Judiciary Law of New York, provides in part:

> "(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional

misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

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"(8) Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state."

Statement

Petitioner was charged with professional misconduct based upon abuse of process. It was alleged that he was responsible for six successive dispossess proceedings in which he pleaded absurd and trivial defenses and counterclaims, some of which he repeated although they had previously been rejected, to harass and annoy the officers and employees of his landlord. He was also charged with initiating a baseless charge of perjury and an unwarranted claim of violation of the criminal law for failure to furnish ice water on Saturdays, followed by an unjustified petition to remove the magistrate who dismissed his complaints. He also sought, on specious grounds, the judicial removal of the judge who presided over the last of the dispossess proceedings.

The Referee to whom the matter was referred for a hearing by the Appellate Division said this petitioner impressed him "as very excitable and emotional. He acted as his own attorney throughout, and in my opinion felt that he was being wronged and was justified in taking the proceedings as above set forth. While his conduct is to be condemned, I do not believe it was an abuse of process" (Pet. Br., p. 14). The suggestion of condemnation, made by the Referee, was implemented by the Appellate Division, which found (see *infra*, pp. 7-8):

> "We consider that his conduct, in these respects, is decidedly to be condemned, but give him the benefit of the doubt that he really thought he was being wronged, however mistakenly he may have thought so, and that he was not actuated entirely by malevolence. For that reason no other disciplinary action is being taken against him this time, except to censure him for his behavior. If there is any further repetition of this type of conduct, the consequences will be more severe. The respondent is severely censured."

Argument

That petitioner was irresponsible in his conduct was spread across the record in the court below. That he is irrational as well seems plain from his effort to manufacture a constitutional question for consideration by this Court. The Appellate Division considered this proceeding carefully and gave petitioner every jot of leniency that he could expect—in our view much more than he deserved.

Under the Judiciary Law of New York the Appellate Division is charged with the duty of administering discipline to offending attorneys. The referee's report is not binding on the Appellate Division, it is merely advisory.

Even without more* the portion of the referee's report printed as an Appendix to the brief for petitioner obviously supports the decision of the lower court. That no rights were violated was thereafter determined by the Court of Appeals, before whom petitioner argued in person.

In short, there is no substantial federal question presented for determination by this Court; on the contrary the petition is frivolous on its face. *Grace* v. *Board of Commissioners of the State Bar of Alabama,* 320 U. S. 708. The Court has held that it has "no authority to re-examine or reverse as a reviewing court" the action of a state court in a disciplinary proceeding. *Selling* v. *Radford,* 243 U. S. 46, at 50. It would appear that Radford's case is sound law today. *Grace* v. *Board of Commissioners, supra; In re Isserman,* 345 U. S. 286, 288.

CONCLUSION

Petitioner suggests that this Court grant certiorari and reverse forthwith (Brief, p. 13). We submit that, even as a matter of discretion, the petition should be denied. Against the background of a related context, Chief Justice Marshall said, in *Ex parte Burr,* 9 Wheat. (22 U. S.) 529, at 530:

> "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be

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* We know of no record having been submitted for consideration by this Court.

preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case."

The petition for a writ of certiorari should be denied.

March 19, 1954.

Respectfully submitted,

FRANK H. GORDON,
43 West 43rd Street,
New York 36, N. Y.,
Counsel for Respondent.

APPENDIX

In the Matter of BENJAMIN LEVITAS, an Attorney, Respondent

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Petitioner

First Department, April 21, 1953.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York. Respondent was admitted to the Bar April 11, 1932, at a term of the Appellate Division of the Supreme Court in the first judicial department.

George G. Hunter, Jr., of counsel (*Frank H. Gordon*, attorney), for petitioner

Benjamin Levitas, respondent in person.

Per Curiam. Charges of abuse of process have been made against respondent. The acts constituting his alleged misconduct appear to have arisen from an inordinate antagonism against his landlord, due to his having been evicted from the space which he occupied in a commercial office building. The Referee's report states: "This respondent impresses me as very excitable and emotional. He acted as his own attorney throughout, and in my opinion felt that he was being wronged and was justified in taking the proceedings above set forth. While his conduct is to be condemned, I do not believe it was an abuse of process." We consider that his conduct, in these respects, is decidedly to be condemned, but give him the benefit of the doubt that he really thought he was being wronged, however mistakenly he may have thought so, and that he was

not actuated entirely by malevolence. For that reason no other disciplinary action is being taken against him this time, except to censure him for his behavior. If there is any further repetition of this type of conduct, the consequences will be more severe. The respondent should be severely censured.

PECK, P.J., GLENNON, DORE, COHN and VAN VOORHIS, J.J., concur.

Respondent severely censured.